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# The New Digital Dating Behavior - Sexting: Teens' Explicit Love Letters: Criminal Justice or Civil Liability

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# The New Digital Dating Behavior—Sexting: Teens' Explicit Love Letters[1]: Criminal Justice or Civil Liability

*by*
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1. Thanks to Kertis Weatherby who described sexting as "Explicit Love Letters," quite a different characterization from those who claim sexting is synonymous with child pornography.

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## I. Introduction

Twenty-first century technology has transformed human relationships. By virtue of e-mail, text, Twitter, Skype, Instant Messenger, or any other form of electronic communication, people meet and socially interact in cyberspace. In this fast-paced, technologically driven era, most relationships, whether business or personal, depend upon some form of electronic or virtual interaction. As technology advances, expanding the ways people communicate, even language must keep apace, resulting in the development of new words. Forms of communication turn into verbs, requiring those less technologically savvy to learn a new vocabulary and a new way of speaking.

"Sexting" is one of those new, hybrid neologisms, combining the mode of technology with the subject matter communicated to create a verb. It is only within the past few years that sexting has become a recognizable word to anyone beyond teenage years.[2] Specifically, sexting is "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs via cellular telephones or over the Internet."[3] Sexting has become almost commonplace among teenagers. This digital generation, which "is built on now,"[4] is accustomed to the instantaneous gratification that comes from the click of a button.

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2. Miranda Jolicoeur & Edwin Zedlewski, *Much Ado About Sexting*, NAT'L INST. OF JUST., June 2010 ("Although the word [sexting] did not exist before 2008, sexting was a finalist for the 'word of the year' by the New Oxford American Dictionary in 2009.").

3. Miller v. Skumanick, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), *aff'd sub. nom.* Miller v. Mitchell, 598 F.3d 139 (3d. Cir. 2010) (affirming district court's granting TRO to prevent state prosecutor from pressing charges against girls involved in sexting, who refused to participate in a re-education program.). Sexting is one form of digital abuse, which also includes cyberbullying and digital dating abuse. Janice Gatti, *MTV & The Associated Press Digital Abuse Study Reveals Pervasiveness of 'Sexting,' Cyberbullying and Digital Dating Abuse*, MTV PRESS, http://mtvpress.com /press/release/mtv_the_associated_press_digital_abuse_study_reveals_pervasiveness_of_sexti/ (hereinafter "MTV Report"); *See also* Iowa v. Canal, 773 N.W.2d 528, 529 (Iowa 2009) ("'Sexting' is the practice of sending nude photographs via text message."). This paper focuses only on sexting (texting or posting) nude or semi-nude pictures involving minors. Texting sexy messages among minors would seemingly implicate stronger First Amendment concerns than texting sexy nude or semi-nude pictures, which could constitute child pornography. However, despite First Amendment speech rights, minors have faced school punishment for electronic messages texted or posted on the Internet, whether occurring on or off school campus, if sufficiently harmful. *See generally* Kevin Turbert, *Faceless Bullies, Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651 (2009).

4. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 16 (2009) (authors included a transcript of interviews with Alpert and his attorney, this is

While most teens engaged in sexting intend nothing nefarious, sexting can lead to tragic results. Two highly publicized stories of sexting involve Jessica ("Jessie") Logan[5] and Philip Alpert.[6] Jessie became a victim of sexting. Unable to deal with the emotional distress she suffered when her nude picture digitally circulated throughout her school, Jessie committed suicide.[7] Philip faced criminal charges for violating child pornography laws for the unauthorized e-mailing of his ex-girlfriend's nude picture.[8] As a registered sex offender, he will suffer the consequences of his sexting well into his adult life.[9] Although certainly culpable of causing harm, it could be argued that Philip, too, is a victim of sexting.

The legal response to sexting and its negative consequences has been problematic. Sexting is hard to put into a legally defined category. From explicit love letters to child pornography and everything in between, where sexting falls on the continuum of First Amendment protections is difficult to determine, but is necessary to form an appropriate legal response.

Thus far, the criminal justice system has responded to the problems of sexting, to very mixed results. Child pornography laws are ill-suited to deal with the harms caused by most teen sexting. Although teen sexting, in general, may be abhorrent to public sentiment, dealing with the morality of such activity is not the role of

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paraphrasing a quote from eighteen-year-old Philip Alpert, now a registered sex offender as the result of sexting his ex-girlfriend's nude picture to third parties).

5. Mike Celizic, *Her Teen Committed Suicide Over "Sexting": Cynthia Logan's Daughter was Taunted about Photo She Sent to her Boyfriend*, THE TODAY SHOW (March 6, 2009), http://www.msnbc.msn.com/id/29546030/.

6. *See generally* Richards & Calvert, *supra* note 4.

7. *See generally* Celizic, *supra* note 5. Jessie was taunted by her high school friends after her ex-boyfriend sexted a nude picture that she previously sent him. A previously vivacious teenager with plans to go to college, Jessie became depressed. In May 2008, Jessie appeared on the TODAY SHOW. Through a blurred image with a distorted voice, Jessie shared her story of humiliation so that other young girls would not suffer the painful consequences of sexting. Despite wanting to help others, Jessie could not find help for herself. Less than two months after her interview on the TODAY SHOW, Jessie hanged herself in her bedroom closet, her cell phone lying on the floor in the middle of her room.

8. *See* Richards & Calvert, *supra* note 4. Philip forwarded the nude picture his ex-girlfriend e-mailed him. With the password she provided him, Philip logged into her e-mail account and sent his ex-girlfriend's nude picture to all of her e-mail contacts.

9. *Id.* Just one month past his eighteenth birthday, Philip was charged with violating child pornography laws. He accepted a plea offer to avoid what prosecutors warned could be a sentence spending most of his life in jail. He received five years probation and mandatory registration as a sex offender, with little possibility of getting off the registry until the age of forty-three. Philip's acceptance to a community college was revoked; he does not have job prospects; and he cannot live in his father's home due to its proximity to a school.

government.[10] Sexting that constitutes child pornography or obscenity is the providence of the criminal justice system,[11] but for everything else, civil law is a more measured and effective legal response.

A perspective that characterizes teen sexting as "kids acting like kids" does not negate the fact that real harm flows from this activity. At its core, the "evil" of sexting is the dignitary and emotional harm caused by the unauthorized public dissemination of private pictures. For a host of reasons discussed below, the common law of torts provides no practical or legally sustainable remedy. Therefore, this paper proposes a statutory civil cause of action holding parents vicariously liable for harms caused by their minors' sexting when done with actual malice. This solution strikes a balance between permitting kids to be kids and placing responsibility on parents to compensate for the harms caused by their children's digital abuse activity. Civil remedies are often the best form of deterrence, and the actual malice standard will avoid the feared "floodgate" problems of tort liability.

Part II will discuss the results of surveys that asked teens about their sexting habits, providing information on the prevalence of teen sexting, its resulting effects, and the legal responses. Part III will review the few reported cases in which teen sextors have been prosecuted and the many cases making headline news of threatened prosecutions. Additionally, this section will discuss the on-going debate on whether sexting is expressive conduct or child pornography. While many states' attorneys consider sexting synonymous with child pornography, this paper posits that child pornography laws were not meant to be both a shield to protect children and a sword to punish them. In considering the pros and cons of both criminal prosecutions and mandatory diversionary programs, Part IV will explore the constitutional pitfalls of forced participation in restorative justice-type programs. In turning to a consideration of tort liability, Part V will discuss why negligent sexting claims are legally unsustainable, impractical, and ill-advised. In conclusion, this paper proposes a statutory civil cause of action holding parents vicariously liable for the harms caused by their

10. *See* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010); *see infra* Part IV. Mandatory re-education classes on why sexting is wrong may infringe on parents' Fourteenth Amendment substantive due process right to be free of government interference in certain aspects of raising children.

11. Some prosecutors and legislators consider all sexting to be child pornography and subject to criminal law sanctions. *See infra* Parts III, IV and accompanying text.

minors' sexting when done with actual malice. This proposal avoids branding teens engaged in teen activity as sex offenders and places responsibility on parents to monitor their children's "digital dating" behavior. Further, this proposal does not foreclose the prosecution of minors under current laws when their sexting is intended for the child pornography market or for commercial gain and involves the evils of child pornography targets. The evils of child pornography are abuse and sexual exploitation of children by others.

## II. Teen Sexting: Its Prevalence, Resulting Effects, and Legislative Responses

### A. Sexting—Digital Flirting

Sexting is the new form of flirting—an explicit love letter. The results of an online study asking teens about their sexting habits suggest that sexting is common among teens between the ages of thirteen and nineteen.[12] One report on the frequency of teen sexting estimates that around twenty percent of American teens have admitted to participating in sexting.[13] When considering both messages and photos, sixty-nine percent of teens sexted someone they dated (thirty-nine percent) or someone they wanted to date (thirty percent).[14] When asked about sending nude photos, twenty percent of the teens surveyed said "they sent or posted naked or semi-naked photos or videos of themselves, mostly to be "fun or flirtatious."[15] Wanting to please someone they were dating or "hook up" with someone new, the overwhelming motive for sexting is as old as the romantic intrigues and motivations of "Adam and Eve."

12. *Sex and Tech: Results from a Survey of Teens and Young Adults*, THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, 1 (Oct. 3, 2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (hereinafter "National Campaign Survey"). The National Campaign to Prevent Teen and Unplanned Pregnancy, in conjunction with CosmoGirl.com, commissioned a survey in an effort to better understand the growing development between sex and cyberspace. Those surveyed were between the ages of thirteen and twenty-six. There were a total of 1,280 respondents, with teens comprising a little more than fifty percent of the respondents (653). *Id.*

13. *Id.* Teenagers in this study are defined as kids between the ages of thirteen and nineteen.

14. *Id.* at 3. The National Campaign Survey concludes that the most common reason teens (60% for both teen girls and boys) send or post sexually suggestive content is to be fun or flirtatious.

15. *Id.* at 4. The National Campaign Survey concludes that the most common reason teens (sixty percent for both teen girls and boys) send or post sexually suggesting content is to be fun or flirtatious.

Most sextors shared his or her naked picture with a romantic interest.[16] Even though most sextors intend that the photo be for the receipient's eyes only, twenty percent of sext recipients pass the photos along to unintended viewers.[17] As one advisor involved in surveying teen sexting habits stated: "Since the beginning of time, teens have flirted with each other and pushed the envelope. But 10 to 15 years ago, it didn't go global in 30 seconds."[18]

Although seventy-five percent of teens engaged in sexting know that it can have negative consequences, this does not appear to be a deterrent.[19] In fact, teens rarely consider the possibility of serious future consequences from their digital flirting.[20] From criminal prosecutions and mandatory registration as a sex offender[21] to serious mental health issues, sexting does have serious negative consequences.[22] Indeed, sexting can have lifelong consequences. As Philip Alpert said, "It was a stupid thing I did because I was upset and tired and it was the middle of the night and I was an immature kid."[23]

16. *Id.* at 2.

17. *Id.*; *see also* MTV Report, *supra* note 3 ("55 percent of young people who shared the images [with unintended viewers] did so with more than one person").

18. Bianca Prieto, *Teens Learning There Are Consequences to "Sexting,"* THE SEATTLE TIMES, March 11, 2009 (quoting Marisa Nightingale, senior advisor for the National Campaign to Prevent Teen and Unplanned Pregnancy, which conducted a survey on teen sexting habits in conjunction with CosmoGirl.com).

19. *Id.*; *See also*, National Campaign Survey, *supra* note 12 at 3 (seventy-five percent of teen respondents acknowledged that "sending sexually suggestive content 'can have serious negative consequences'").

20. National Campaign Survey, *supra* note 12; *see also* MTV Report, *supra* note 3 ("only 51 percent believ[e] that their digital actions could come back to haunt them"). In asking respondents about negative consequences, the survey did not distinguish the sending or posting of nude and semi nude pictures from other forms of digital abuse.

21. Adam Walsh Child Protection & Safety Act of 2006, Pub. L. No. 109–248, 120 U.S.C. § 587 (2006) (The National Guidelines for Sex Offender Registration and Notification require mandatory registration of anyone over fourteen at the time of the offense, who has been convicted of aggravated sexual abuse of a child, including the use of a minor in a sexual performance and the production or distribution of child pornography.) Some of the proposed legislation, targeting the problem of sexting, removes the requirement of mandatory sex offender registration for minors. *See infra* note 34.

22. *See* National Campaign Survey, *supra* note 12. Those who have sexted are four times more likely to contemplate suicide than those who have not engaged in sexting activity (twelve versus three percent respectively).

23. Deborah Feyerick & Sheila Steffen, *"Sexting" Lands Teen on Sex Offender List*, CNN NEWS (Apr. 8, 2009), http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html (describing a jilted boyfriend who sent the nude photo his girlfriend sexted him to people who she did not intend to view her naked photo); *See* Richards & Calvert, *supra* note 4 (discussing the case of eighteen-year-old Philip Alpert, who received five years probation and mandatory registration as a sex offender until age forty-three, at a minimum, for angrily sending a nude picture of his ex-girlfriend to unintended viewers.

"I'm being punished for the rest of my life for something that took two minutes or less to do."[24]

### B. Legal Responses

As sexting and its consequences continue to make headline news, prosecutors struggle to apply old laws to this new form of "digital dating" behavior. Like Philip Alpert, many sextors are being prosecuted as child pornographers.[25] Academics and mainstream news reporters question the wisdom and legality of applying child pornography laws to teen sextors.[26] Neither criminal law nor restorative justice principles[27] are well-served by treating teen sexting as child pornography. The strict penalties prescribed by child pornography laws are disproportionately harsh for punishing juvenile sextors.[28] As the Supreme Court has said and reiterated, minors are "different" when it comes to the imposition of the harshest sentences.[29]

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This article includes transcript of actual interview with both Philip Alpert and his attorney, Lawrence Walters.).

24. *Id.*

25. *See infra* Part II.

26. *See* John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010) (discussing whether teen sexting and "autopornography" fall within the category of unprotected speech carved out by the Supreme Court and if the harms contemplated by the Supreme Court in creating the unprotected category of child pornography apply to these depictions). "Whatever else one may make of all this, there is certainly reason to suspect something is profoundly amiss when a system of laws makes serious felony offenders of such a large portion of its young people." *Id.* at 438; Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1 (2007) (discussing that child pornography laws apply to teen sexting); Stephen F. Smith, *Jail for Juvenile Child Pornographers? A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505 (2008) (discussing negative implications of prosecuting teen sextors as child pornographers and mandatory sex offender registration requirements).

27. For a discussion of restorative justice principles, differences between the goals of criminal law and restorative justice, and examples of restorative justice programs, *see generally* Terri Day & Almir Maljevic, *Teaching and Implementing Restorative Justice and Its Relevance to Criminal Justice in Bosnia- Herzegovina in the 21st. Century*, 2 RESTORATIVE DIRECTIVES J. 64 (May 2006).

28. *See* Humbach, *supra* note 26, at 437 (discussing the harsh penalties under state and federal laws for producing, possessing or distributing depictions that meet the definition of child pornography).

29. Graham v. Florida, 130 S. Ct. 2011 (2010) (banning life imprisonment without the possibility of parole for juvenile offenders who commit nonhomicide crimes); Roper v. Simmons, 543 U.S. 551 (2005) (banning the death penalty for juvenile offenders). Both cases recognized that juveniles' immaturity means "irresponsible conduct is not as morally reprehensible as that of an adult." Roper, 543 U.S. at 560 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

Prosecuting teen sextors as child pornographers does not do justice to the victim,[30] offender, or the community. It is a drain on community resources. Additionally, such a policy dilutes the importance of sex offender registries by including teen sextors.[31] Although the threat of criminal sanctions is considered a strong deterrent, its deterrent effect on adolescents is negligible.[32] There are other, more effective ways to deter sexting abuses without draining community resources and transforming teens into sex offenders, which stigmatizes the sextor well into his adult life.[33]

Legislators responded to the public outcry that treating juvenile sextors as child pornographers was draconian. Some of these responses included enacting or proposing legislation which explicitly excluded sexting from child pornography laws,[34] removing the mandatory sex offender registration requirement,[35] making sexting a misdemeanor,[36] or sanctioning education for offenders.[37] Creating more options for prosecutors, these enacted or proposed legislative changes are preferable to existing child pornography laws and provide a more proportional and appropriate response to sexting. However, in large part, the statutes still criminalize adolescents for

30. In most of these cases, the "victim" voluntarily sent her nude picture to the person responsible for sexting it to others. Often, the picture was unsolicited.

31. Sex offender registries are supposed to alert communities of potential dangerous child predators. Teen sextors are highly unlikely to pose a future threat to children as sex offenders. If persons not likely to pose future threats are included in the sex registry databases, these registries are not serving the community or the purpose for which they were mandated. *See generally* Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration*, 32 SETON HALL LEGIS. J. 261 (2008).

32. Richards & Calvert, *supra* note 4, at 24 (quoting Philip Alpert: "Teenagers do what they do because it's fun, and they don't care if it is illegal.").

33. Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 129 (2000).

34. H.B. 1335, 2010 Leg. (Fla. 2010); S.B. 2560, 2010 Leg. (Fla. 2010); H.B. 57, 2010 Reg. Sess. (Ky. 2010); H.B. 143, 2010 Reg. Sess. (Ky. 2010); H.B. 1357, 2010 Reg. Sess. (La. 2010); H.B. 643, 2010 Reg. Sess. (Miss. 2010); H.B. 473, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S.B. 1121, 2009 Reg. Sess. (Pa. 2009); H.B. 7778, 2010 Reg. Sess. (R.I. 2010); S.B. 2635, 2010 Reg. Sess. (R.I. 2010); H.B. 4504, 118th Gen. Assem., Reg. Sess. (S.C. 2009).

35. H.B. 1335, 2010 Leg. (Fla. 2010); S.B. 2560, 2010 Leg. (Fla. 2010); H.B. 57, 10 Reg. Sess. (Ky. 2010); H.B. 143, 10 Reg. Sess. (Ky. 2010); L.B. 285, 101st Gen. Assem., Reg. Sess. (Neb. 2009); S.B. 125, 2000 Leg. (Vt. 2009).

36. S.B. 1266, 2010 Reg. Sess. (Ariz. 2010); H.B. 4583, 2010 Reg. Sess. (Ill. 2010); S.B. 2513, 2010 Reg. Sess. (Ill. 2010); H.B. 57, 2010 Reg. Sess. (Ky. 2010); H.B. 143, 2010 Reg. Sess. (Ky. 2010); H.B. 643, 2010 Reg. Sess. (Miss. 2010); H.B. 473, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S.B. 1121, 2009 Reg. Sess. (Pa. 2009).

37. H.B. 1115, 2010 Reg. Sess. (Ind. 2010); S.B. 152, 2010 Reg. Sess. (Ind. 2010); A.B. 1561, 2010 Reg. Sess. (N.J. 2010); H.B. 4504, 118th Gen. Assem., Reg. Sess. (S.C. 2009).

engaging in fairly typical teen activity and fall short in providing effective deterrence.[38] Additionally, these legal remedies raise constitutional issues.[39]

## III. Sexting: Constitutionally Protected or Child Pornography?

### A. States Get Tough on Teen Sexting

Most people would not equate teen sextors with child pornographers. However, according to several prosecutors, sexting satisfies the statutory definition of child pornography as defined by state and federal law.[40] In fact, states are applying child pornography laws to prosecute kids who make nude or semi-nude pictures of themselves, send those pictures, and store them on their cell phones and computers. Although statutory language varies, "sexually explicit visual portrayals that feature children"[41] would satisfy the statutory definition of child pornography under most state and federal statutes. Although the laws are constnatly changing, many states still treat teen sexting as child pornography.[42] Alabama, California, Connecticut, Florida, Georgia, Iowa, New Jersey, New York, Texas, Utah, Wisconsin, Virginia, and Pennsylvania are some of the states that have brought charges against sextors.[43] These charges are usually

38. *See infra* Part IV.

39. *See infra* Part IV and accompanying text.

40. 18 PA. CONST. STAT. § 6312 (2009) ("Any person who knowingly . . . distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses . . . any, . . . photograph, film videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act . . . ."); 11 DEL. CODE ANN. § 1111 (West 2010) ("A person is guilty of possession of child pornography when the person knowingly possesses any visual depiction of a child engaging in a . . . sexual act . . . ."); *See* U.S. v. Williams, 128 S. Ct. 1830, 1837 (2008) (quoting provision of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act"), 18 U.S.C. § 2252A (2010) (adding a new pandering and solicitation provision to federal child pornography statute).

41. *Williams*, 128 S. Ct. at 1836 (upholding conviction under new pandering section of PROTECT Act which defines child pornography as "a visual depiction of an actual minor engaging in sexually explicit conduct").

42. Feyerick & Steffan, *supra* note 23 (quoting attorney Larry Walters, who defended an eighteen-year-old "sexter" prosecuted under Florida child pornography laws). "Sexting is treated as child pornography in almost every state and it catches teens completely off guard because this is a fairly natural and normal thing for them to do. It is surprising to us as parents, but for teens it's part of their culture." *Id.*

43. Jodi Andrefski, *Sexting Can Label Your Teen a Sex Offender*, GADGETELL (Apr. 13, 2009), http://www.gadgetell.com/tech/comment/sexting-can-label-your-teen-a-sex-offender/; Susan L. Pollet, *Teens and Sex Offenses: Where Should the Law Draw the Lines?*, 242 N.Y.L.J. 4 (Aug 2009); Jeffry Scott, *Sexting Stumps State's Schools, Prosecutors*, ATLANTA J.-CONST., Apr. 22, 2010, at A1, *available at* 2010 WL 8277089;

brought under child pornography laws.[44] However, other state laws, including those prohibiting child molestation, disseminating obscene material to a minor, and taking indecent liberties with a minor may be used to prosecute digital sex activities involving minors.[45]

In Pennsylvania, three teenage girls between the ages of fourteen and seventeen were charged with disseminating child pornography when they sexted their boyfriends.[46] The boys who received the photos were charged with possession of child pornography.[47] An Indiana teen faced felony obscenity charges for sending a picture of his genitals to female classmates.[48] Central Ohio authorities filed felony charges against a fifteen-year-old girl accused of sexting nude photos of herself to high school classmates.[49] In Spotsylvania, Virginia, the prosecutor brought charges against two high school students in the county's first sexting case involving multiple girls, ranging in age from twelve to sixteen.[50] In another state case, prosecutors contemplated bringing child pornography charges against a boy for forwarding a sext from his then fourteen-year-old girlfriend.[51] In California, four fifteen-year-old boys were cited for "possession of harmful matter depicting a person under 18 . . . ." and for sexual exploitation of a minor after posting nude and semi-nude pictures of their classmates on the Internet.[52] In Georgia, a tenth

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*Three Culpeper Juveniles Accused in Sexting May Avoid Felony Prosecution*, RICHMOND TIMES DISPATCH, Apr. 19, 2010, *available at* 2010 WL 8099947; David Kelly, *Yucaipa Teens Cited in "Sexting" Case*, L.A. TIMES, Apr. 15, 2010, at 3, *available at* 2010 WL 7763331; Tamar Lewin, *Rethinking Sex Offender Laws for Youths Showing Off Online*, N.Y. TIMES, Mar. 21, 2010, at A1, *available at* 2010 WL 5885379.

44. Andrefski, *supra* note 43.

45. *See generally* Robin Fretwell Wilson, *Protecting Virtual Playgrounds: Children, Law, and Play Online: Sex Play in Virtual Worlds*, 66 WASH & LEE L. REV. 1127 (2009) (discussing prosecutors' options to punish adults involved in virtual sex with minors).

46. Kim Zetter, *Child Porn Laws Used Against Kids Who Photograph Themselves*, WIRED (Jan. 15, 2009, 9:50 AM), http://www.wired.com/threatlevel/2009/01/kids/.

47. *Id.*

48. Ed Bushnell, *Sweet "Sext"teen: When Child Pornography Victims Become Defendants*, THE LEGALITY (Feb. 19, 2009), http://www.thelegality.com/2009/02/19/sweet-sextteen-when-child-pornography-victims-become-defendants.

49. *Girl, 15, Faces Child Porn Charges for Nude Cell Phone Pictures of Herself*, FOX NEWS (Oct. 9, 2008), http://www.foxnews.com/story/0,2933,434645,00.html.

50. *Spotsylvania Teens Arrested in County's First Sexting Case*, ABC NEWS (Mar. 10, 2009), http://www.wjla.com/news/stories/0309/602574.html?fntsize=2.

51. *Boy Could Face Kid Porn Charges for Sexting*, UPI (Feb. 18, 2009), http://www.upi.com/Top_News/2009/02/18/Boy-could-face-kid-porn-charge-for-sexting/UPI-60941234992875/.

52. Kelly, *supra* note 43 at 3.

grade boy sent a naked image of himself to a sixteen-year-old girl.[53] The photo was then forwarded to four other students, one of whom was fourteen years old.[54] The boy was arrested at school and charged with the misdemeanor of furnishing obscene material to a minor.[55] He spent the night in county jail and was released the next day on a $2,000 bond.[56] In Rochester, New York, a sixteen-year-old is facing up to seven years in prison for forwarding a nude photo to his girlfriend.[57] Further, it is not just high school kids who are being charged.[58] Four middle-schoolers were arrested in Alabama for exchanging nude photos.[59]

Newspapers and internet news sites are replete with articles about pending criminal charges against teen sextors; however, there are few reported cases.[60] Prosecutors encourage and accept plea bargains, which may explain the dearth of reported cases.[61] Another explanation may be that these are confidential juvenile matters that are referred to diversionary programs.

### B. Child Pornography Laws: Both Shield and Sword?

In 1982, the Supreme Court decided *New York v. Ferber*[62] which designated child pornography as a category of speech unprotected by the First Amendment. In *Ferber*, the defendant bookstore owner was convicted of violating a New York statute for selling films to undercover police officers of young boys masturbating.[63] The defendant appealed his conviction claiming that the New York statute

53. Scott, *supra* note 43 at A1.

54. *Id.*

55. *Id.*

56. *Id.*

57. Susan L. Pollet, *Teens and Sex Offenses: Where Should the Law Draw the Lines?*, 242 N.Y.L.J. 4 (Aug. 2009).

58. *Id.*

59. *Id.*

60. One reported case is Iowa v. Canal, 773 N.W.2d 528 (Iowa 2009) (affirming eighteen-year-old defendant's conviction of knowingly disseminating obscene material to a minor based on e-mailing a photo of his erect penis to a fourteen-year-old female). On appeal, defendant raised two issues: 1) sufficiency of evidence to establish the e-mails he sent were obscene; and 2) ineffective assistance of counsel for failure to object to the jury instruction defining obscene material. *Id.* Since this case does not involve prosecution of sexting by a minor, it is not relevant to the thesis of this paper.

61. Richards & Calvert, *supra* note 4 at 19-20 (discussing how he cooperated with the police based on their assurances that the matter was "[not] that big of a deal" and he would not get arrested; his attorney at the time did not advise him that pleading guilty to charges would include mandatory registration as a sex offender).

62. 458 U.S. 747 (1982).

63. *Id.* at 751–52.

was unconstitutional because the statute did not require proof that the objectionable material was obscene under *Miller v. California*.[64] The Court held that states may regulate child pornography without applying the *Miller* test.[65]

Although child pornography restrictions are content-based, the Court listed several reasons to permit such regulation without proof that the material is obscene under the *Miller* test. First and foremost, the Court recognized that states have a compelling interest in protecting children.[66] Using children in the production of pornography is harmful to their physical and psychological well-being.[67] Further, the Court held that there are no First Amendment obstacles to punishing the distribution of child pornography.[68] As the Court stated, "The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to sexual abuse of children."[69] Once created, the pornography exists as a permanent record of the abuse.[70] Since the production of child pornography involves illegal activity—the abuse and sexual exploitation of children, there is no impediment to punishing those who distribute the fruits of such illegal activity.[71] Finally, in balancing the value of child pornography against the harms caused by its production and distribution, the Court concluded that the First Amendment does not protect child pornography because "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake."[72]

Although it determined that child pornography is unprotected speech, the Court limited its decision to visual works and required an element of scienter to convict persons of violating child pornography

64. 413 U.S. 15, 24 (1973) (establishing the test for obscenity: "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.").

65. *Ferber*, 458 U.S. at 756. *See* Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment rights are protected from state infringement by Fourteenth Amendment incorporation).

66. *Ferber* at 756–57.

67. *Id.*

68. *Id.*

69. *Id.* at 759.

70. *Id.*

71. *Id.*

72. *Id.* at 763–64.

laws.[73] In a later decision, the Court extended its prohibition of child pornography to possession as well as to production and distribution.[74]

Congress attempted to extend *Ferber* to virtual child pornography. The Child Pornography Prevention Act ("CPPA"), which Congress passed in 1996, prohibited "such visual depiction [that] is, or appears to be, of a minor engaging in sexually explicit conduct."[75] This provision of the CPPA pertained to virtual child pornography, which includes production of child pornography using adults who look like children or computer animation.[76] The Court struck down the virtual child pornography provision of the CPPA in *Ashcroft v. Free Speech Coalition*.[77] Since virtual child pornography did not involve actual harm to real children, the Court was unwilling to extend the *Ferber* rule allowing regulation of objectionable material without proof of obscenity to virtual child pornography.[78]

Despite the fact that some prosecutors equate sexting with child pornography and have charged or threatened to charge sextors as child pornographers, it is not at all clear where sexting falls on the continuum of First Amendment expressive rights. *Ferber* made clear that using actual children in a harmful way ("depicting sexual activity"[79]) to produce and distribute child pornography is punishable without applying the *Miller* obscenity standard.[80] In comparison, virtual child pornography is subject to the *Miller* obscenity test. In addition to these Supreme Court parameters of what is child pornography, the Court has stated that "depictions of nudity, without more, constitute protected expression."[81] Therefore, the Court has

73. *Ferber*, 458 U.S. 747.

74. Osborne v. Ohio, 495 U.S. 103 (1990) (refusing to extend Stanley v. Georgia, 394 U.S. 557 (1969), which recognized the right to possess obscene material in one's home, to the possession of child pornography).

75. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (2000).

76. 535 U.S. 234, 240 (2002).

77. *Id.* (finding the provision overbroad and unconstitutional because it punished "non-obscene" pornography without the *Ferber* concern of actual harm to real children).

78. *Id. See* United States v. Williams, 553 U.S. 285 (2008) (affirming defendant's conviction under the PROTECT Act's anti-pandering provision when only discussed exchanging child pornography photos in internet chat room; defendant claimed conviction violated First Amendment arguing *Ashcroft v. Free Speech Coalition*; if virtual child pornography is protected, then speech about child pornography is certainly protected); *but see Williams*, 553 at 313-15 (Souter, J., dissenting) (criticized the Court for doing an end run around *Ashcroft v. Free Speech Coalition*).

79. *Ferber*, 458 U.S. at 759.

80. *Id.*

81. Osborne v. Ohio, 495 U.S. 103, 112 (1990) (citing *Ferber*, 458 U.S. at 765 n. 18).

drawn a line between protected "innocuous photographs of naked children" and unprotected "lewd exhibitions of nudity."[82]

### C. Legally Defining Sexts—'I Know It When I See It'[83]

Based on the labyrinth of Supreme Court cases about child pornography, sexting, which qualifies as child pornography, might be defined as depictions of minors engaged in sexual activity that are lewd and harmful to the minor's physical or psychological well-being.[84] Ostensibly, those who produce, distribute or possess such depictions could be charged and successfully prosecuted as child pornographers.

Justice Stewart's famous quote, "I know it when I see it," might apply to lewd depictions of minors engaged in sexual activity, as well as to obscenity. The dictionary definition of lewd is: "inclined to, characterized by, or inciting to lust or lechery, lascivious."[85] The dictionary defines lechery as "unrestrained or excessive indulgence of sexual desire,"[86] and defines lascivious as "arousing sexual desire."[87] Dictionary definitions, however, are often too general to apply in the legal context. Several courts have followed the factors set out in *United States v. Dost*[88] to determine whether a depiction satisfies the legal element of lewd required by child pornography statutes. The *Dost* factors cover a broad spectrum of behavior; and a depiction need not satisfy all the factors to be considered lewd.[89] Most teen

82. *Id.* at 114.

83. Justice Stewart's famous quote. Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964).

84. It is the author's opinion that the reason for placing child pornography in a category of unprotected speech—to protect children from abuse and exploitation—should be a consideration when determining whether a particular depiction constitutes child pornography.

85. *Lewd Definition*, DICTIONARY.COM ONLINE DICTIONARY, http://dictionary.reference.com/browse/lewd (last visited Sept. 27, 2010).

86. *Lechery Definition*, DICTIONARY.COM ONLINE DICTIONARY, http://dictionary.reference. com/browse/lechery (last visited Sept. 27, 2010).

87. *Lascivious Definition*, DICTIONARY.COM ONLINE DICTIONARY, http://dictionary.reference. com/browse/lascivious (last visited Sept. 27, 2010).

88. 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.*, U.S. v. Wiegand, 812 F.2d 1239 (9th Cir. 1987) (subjecting defendants to federal child pornography prosecution for nude photographs of girls, fourteen and ten years old); U.S. v. Frabizio, 459 F.3d 80, 83 (1st Cir. 2006); U.S. v. Rivera, 546 F.3d 245, 249 (2d Cir. 2008); U.S. v. Villard, 885 F.2d 117, 122 (3d Cir. 1989); U.S. v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); U.S. v. Noel, 581 F.3d 490, 499 (7th Cir. 2009); U.S. v. Wallenfang, 568 F.3d 649, 657 (8th Cir. 2009); U.S. v. Helton, 302 Fed. App'x 842, 847 (10th Cir. 2008).

89. *Dost*, 636 F. Supp. at 832. The factors are as follows:

sexts would qualify as lewd, according to the factors, which include "inappropriate attire," "sexual coyness," and whether the picture is "intended to elicit a sexual response in the viewer."[90] Even a picture of a teenager in a bathing suit might qualify as lewd.[91]

### D. *A.H. v. State*[92] Sexting and Privacy Rights

#### *1. Teen Sex—Yes; Teen Sexting—No*

Even if a sext qualifies as lewd under the *Dost* factors, who is being harmed or sexually exploited by voluntarily sending such pictures to a love interest? In fact, this was the question asked by two Florida teens who were charged with second degree felonies for taking photographs of themselves naked and engaged in sexual activities.[93] One of the defendants appealed her delinquency adjudication.[94] She argued that Florida's constitutional right of privacy protected her from prosecution for engaging in consensual sexual activity and should extend to taking pictures of such activity.[95]

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1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

90. *Id.*

91. *See* Miller v. Mitchell, 598 F.3d 139, 144 (3d Cir. 2010) (threatening prosecution for violating child pornography laws in case where a teenager girl was pictured in her bathing suit; the prosecutor commented that because her pose was provocative, the picture qualified as child pornography).

92. 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

93. *Id.* (the defendants were sixteen and seventeen years old; both were charged as juveniles and adjudicated delinquent on a plea of *nolo contendere*).

94. *Id.*

95. *Id.* at 239 (arguing they had a constitutional right of privacy to take pictures of themselves engaged in sexual activities according to *B.B. v. State*, 659 So. 2d 256, 260 (Fla. 1995) (recognizing a state constitutional right of privacy protecting minors from prosecution for engaging in consensual sexual activities)).

While the Florida Supreme Court did not recognize a constitutional right for minors to have consensual sex, the Court did state that the express right of privacy in the Florida Constitution[96] applied to minors as well as adults.[97] Therefore, any statute that infringed on a minor's fundamental right of privacy must satisfy strict scrutiny.[98] As such, the court in *A.H.* concluded that a Florida statute prohibiting sexual intercourse between consenting minors was unconstitutional as applied because it was not the least restrictive means of achieving the state's interest in protecting teens from harm caused by engaging in sexual activity.[99]

Unpersuaded by appellant's argument, the First District Court of Appeal affirmed the felony delinquency judgment.[100] The court held that any constitutional right of privacy that the teens had to engage in sexual activities did not extend to photographing their own, allegedly, legal sexual activity.[101] According to the court, it was reasonably foreseeable that such pictures stored on a computer would be shared with others either intentionally or inadvertently; therefore, there could be no expectation of privacy in the pictures.[102] Even if an expectation of privacy existed, the court held that prosecution under the Florida statute, prohibiting pictures of minors engaged in sexual activity, was the least restrictive means of protecting minors from sexual exploitation.[103] The court was concerned that "future damage may be done to these minors' careers or personal lives" if the photos were shared with third parties.[104]

### 2. *Exploited or Exploiter and Expectations of Privacy*

The court reviewed this case through the prism of privacy rights based on Florida's express constitutional provision and state court precedent. Indeed, the "evils" of most teen sexting appear more akin to an invasion of privacy rights than to violations of child pornography laws. The majority and dissent in this case disagreed on two key points that go to the heart of whether sexting should be treated the same as child pornography.

96. F.S.A. CONST. art. I, § 23.
97. *A.H.*, 949 So. 2d at 239 (citing B.B., 659 So .2d at 259).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 238–39.
102. *Id.*
103. *Id.*
104. *Id.* at 239.

The first point related to statutory interpretation. The applicable Florida statute intended "to protect minors from exploitation by *anyone* who induces them to appear in a sexual performance and shows that performance to other people."[105] The majority and dissent disagreed on whether the term "anyone" included the appellant herself. If child pornography statutes are meant to protect minors from abuse by others, then the statutes do not apply to minors who voluntarily make and send their own nude and semi-nude pictures to others.[106] In addition to the statutory interpretation question, the issue remains whether "autopornography"[107]—documenting one's own legal sexual conduct and nudity—involves exploitation at all.

The second key consideration involved privacy expectations and the minors' intent regarding who would view the pictures. The statute intended to protect minors from other people who may view depictions of them appearing in a sexual performance.[108] The court reasoned that appellant had no expectation of privacy in the pictures since it is reasonably foreseeable that the pictures would be seen by unintended persons, either intentionally or inadvertently.[109] The dissent, however, focused on appellant's subjective intent.[110] As Justice Padovano stated, "The issue is whether the child intended to keep the photos private, not whether it would be possible for someone to obtain the photos against her will and thereby to invade her privacy."[111]

An expectation of privacy must be reasonable under the circumstances (objective) and must be subjectively intended by the individual.[112] Assuming that the Florida teens have a right to share their photos with each other, have they violated the statute without intending or knowing that the photos of their sexual activity would be shown to others? The simple answer is found in the statute and its definition of scienter.

However, the teens' intent should be considered in a broader sense. Absent coercion, teens who take nude or semi-nude pictures of themselves intended for each other are not committing child abuse

105. *Id.* at 238 (emphasis added).

106. *Id.* at 239 (Padovano, J., dissenting) (saying that the statute was meant to protect abuse by others, not to punish a teen sextor for her own mistake).

107. *See* Humbach, *supra* note 26 at 438.

108. *A.H.*, 949 So. 2d at 237.

109. *Id.*

110. *Id.* at 239–40.

111. *Id.* at 240 (Padovano, J., dissenting).

112. *Id.* at 238.

or sexual exploitation. The evils that the child pornography laws were meant to remedy are absent from a consensual exchange of nude or semi-nude pictures, even when minors are involved. Statutory rape laws recognize exceptions, under "Romeo and Juliet" provisions when minors close in age are involved in consensual sexual relations.[113]

In *Ashcroft v. Free Speech Coalition*, the Supreme Court was unwilling to treat virtual child pornography the same as actual child pornography for First Amendment purposes.[114] Absent actual harm to real children, virtual child pornography restrictions are subject to the *Miller v. California* obscenity standard. Like virtual child pornography, the *Miller* obscenity standard should apply to restrictions on consensual teen sexting when those activities do not involve abuse or exploitation.

However, pictures stored in cell phones and computers are permanent, and could lead to future exploitation of those appearing in the photos if ever disseminated to unintended viewers.[115] According to the Florida court, there is a high potential for exploitation based on the likelihood of dissemination and the potential market value of the pictures.[116]

The Florida court stated: "A reasonably prudent person would believe that if you put this type of material in a teenager's hand that, at some point either for profit or bragging rights, the material will be disseminated to other members of the public."[117]

The problem with the court's logic is that it is willing to punish minors for the exploitation of others. The child pornography laws are intended to punish the exploiters, not the exploited. The court seems to apply a negligence standard, punishing the teens for creating a reasonably foreseeable risk of future harm to themselves. Those that use private pictures to exploit or purposely harm should be punished. As the dissent stated, "The critical point . . . is that [s]he did not attempt to exploit anyone or embarrass anyone."[118] Child

113. *See* KAN. STAT. ANN. § 21-3522 (2009) (Unlawful voluntary sexual relations, commonly known as the Romeo and Juliet law, defined as engaging in voluntary sexual intercourse with a child who is fourteen years of age but less than sixteen years of age and the offender is less than nineteen years of age and less than four years of age older than the child).

114. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002).

115. *See A.H.*, 949 So. 2d at 239.

116. *Id.* at 238.

117. *Id.* at 237.

118. *Id.* at 240–1 (Padovano, J., dissenting).

pornography laws intended to shield minors from sexual exploitation by others[119] should not be used as a sword to punish teen sextors unless there is evidence that sextors are intentionally exploiting or abusing minors either for profit or for the prurient interests of unintended viewers.

## IV. Constitutional Pitfalls of Mandatory Restorative Justice Programs

### A. *Miller v. Mitchell*:[120] Prosecutors Beware

Although the Florida teens did not challenge their felony delinquency judgments under the First Amendment, the parents of some Pennsylvania teens did raise First Amendment issues. After discovering widespread teen sexting, the District Attorney proposed a diversionary program for the kids involved.[121] He offered the teens involved in sexting and their parents the choice of mandatory participation in a restorative justice program, or the threat of criminal prosecution under state child pornography laws.[122] Three of the affected teens and their parents refused to consent to a "re-education" course, which required an admission of wrong-doing, along with other lessons and assignments, probation and drug testing.[123] These parents, on behalf of their minor children, filed suit in federal court seeking declaratory relief[124] and claimed a violation of plaintiffs' constitutional rights.[125] Without reaching the merits of the

119. This author agrees with the dissent; child pornography laws are meant to protect children from abuse and exploitation by others. However, the statute does not specify that the "other" must be an adult.

120. 598 F.3d 139 (3d Cir. 2010).

121. Miller v. Skumanick, 605 F. Supp. 2d 634, 640 (M.D. PA. 2009), *aff'd Miller*, 598 F.3d 139.

122. *Id.*

123. *Id.*

124. *Id.* at 640–41. Plaintiffs filed a motion for a temporary restraining order, asking the court to enjoin the district attorney's office from initiating criminal proceedings against the Plaintiffs for violating child pornography laws.

125. *Id.* The Plaintiffs claimed that a choice to participate in a mandatory re-education program, which required an admission of wrong-doing, or face prosecution violated the Plaintiffs' First Amendment rights. Asserting that the alleged pornographic pictures did not violate the law, Plaintiffs maintained that mandatory participation in the re-education program, requiring an essay on their wrong-doing, amounted to "retaliation in violation of Plaintiffs' First Amendment right to be free from compelled expression." *Id.*

constitutional claims, the Third Circuit Court of Appeals granted the Motion for Preliminary Injunctive Relief.[126]

In a letter to the parents of several teens, who either appeared in the pictures or who stored the pictures on their cell phones, the District Attorney explained the options available to the affected students and scheduled a group meeting.[127] At the group meeting, some parents questioned how the seemingly innocuous pictures could constitute child pornography.[128] One picture showed a girl in a bathing suit; another picture depicted two girls "from the waist up wearing, white opaque bras."[129] The District Attorney responded that the girls in the pictures were posing "provocatively," which is sufficient to charge the students with child pornography.[130] However, the District Attorney did not respond when one of the parents asked who determines what is provocative.[131]

The parents, who refused the District Attorney's offer of a re-education program for their children in lieu of prosecution, alleged that the threat of prosecution was in retaliation for exercising their constitutionally protected rights as parents and their children's constitutional rights to be free from compelled speech.[132] One of the parents objected to the program's lessons which included "why the minors' actions were wrong, what it means to be a girl in today's society, and non-traditional societal and job roles."[133] Viewing these as "values-based" lessons and contrary to the "beliefs she wishes to

126. *Miller v. Mitchell*, 598 F.3d at 155 (granting Plaintiffs' Motion for Preliminary Injunction remanding case for consideration of Plaintiffs' claims of retaliation based on exercising their constitutional rights).

127. *Id.* at 143–44.

128. *Id.* at 144.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 148. A retaliatory claim is a little different than a direct constitutional claim. *Id.* at 149. "To prevail on a retaliatory claim, a plaintiff must prove '(1) that he engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation.'" *Id.* at 147. (quoting Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282 (3d Cir. 2004)). The Plaintiffs claimed that the threat of prosecution was in retaliation for exercising their Constitutional rights: (1) minors' First Amendment right to free expression in appearing in the photographs; (2) minors' First Amendment right to be free from compelled speech [the program's required essay explaining how their actions were wrong]; and (3) parents' Fourteenth Amendment substantive due process right to direct their children's upbringing, the interference being certain items in the education program that fall within the domain of the parents, not the District Attorney. *Id.* at 148.

133. *Id.* at 150.

instill in her daughter," the parent claimed that the state was interfering with her fundamental right to raise her child.[134]

The court also considered the minors' retaliation claim of compelled speech in order to avoid prosecution.[135] The program required the girls appearing in one of the pictures to admit to wrongdoing, even though they did not believe their actions were wrong.[136] Compelling the girls to write an essay on why their actions were wrong, contrary to their actual beliefs, in order to avoid prosecution "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[137]

Without deciding whether the plaintiffs' constitutional rights were violated, the court affirmed the grant of a preliminary injunction because plaintiffs satisfied their burden of showing a likelihood of success on the merits of their claims.[138] The circuit court recognized the serious implications of a federal court enjoining a state prosecution and that "judicial intrusion into executive discretion of such high order [to prosecute] should be minimal."[139] However, the court was satisfied that this was one of the rare instances where there the plaintiff had a high likelihood of showing that "any prosecution would not be based on probable cause that [plaintiffs] committed a crime, but instead in retaliation for [plaintiffs'] exercise of [their] constitutional rights not to attend the education program."[140]

Upon remand, the district court issued a permanent injunction barring the state from filing charges against the Pennsylvania students who refused to participate in a re-education program aimed at deterring sexting.[141] This case may well serve as a wake-up call to prosecutors to exercise restraint in charging teen sextors and to cease the practice of coercing restorative justice/education programs for teen sextors by threat of criminal charges. Although this decision

134. *Id.*

135. *Id.* at 152.

136. *Id.*

137. *Id.* (quoting W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis omitted) (holding that children's First Amendment rights were violated when forced to participate in the Pledge of Allegiance).

138. *Id.* at 155.

139. *Id.* at 154 (quoting Hartman v. Moore, 547 U.S. 250, 263 (2006) (discussing retaliatory prosecution claims)).

140. *Id.* at 155 ("We realize that considerations of comity, federalism, and prosecutorial discretion are implicated by this injunction").

141. *Judge Bars 'Sexting' Prosecution of PA Girls*, PITTSBURG POST-GAZETTE, May 2, 2010, at A12, 2010 WL 9082165; Miller v. Mitchell, 2010 WL 1779925 (M.D. Pa. 2010).

reflects the opinion of only one district court and one appellate court in one federal circuit, it could signal the harbinger of shaping a constitutionally permissible response to sexting.

### B. Sexting and Protecting Constitutional Rights of Both Parents and Children

Offering defendants plea bargains or diversionary programs in lieu of prosecution and requiring an admission of guilt are everyday occurrences in the criminal justice system. However, that type of prosecutorial bargaining, so routine in other contexts, was unacceptable in the sexting context. One conclusion to draw from *Miller v. Mitchell* is that *some* sexting does implicate First Amendment expressive rights.[142] The court made a distinction between transmitting nude photographs of minors to third parties without authorization and the racy photos the girls took of themselves and stored in their cell phones to be shared with persons of their choice. To extrapolate further, self-made nude or semi-nude photos, though provocative, are not child pornography. Teens have a First Amendment right to take these pictures, store these pictures and distribute them to persons of their choice, with the obvious exception of distribution for commercial gain. The dissenting opinion in the Florida case, *A.H. v. State*, may well become the prevailing view. The dissent held that child pornography is not defined by self exploitation and the minors' subjective intent regarding distribution is relevant to the issue of criminal culpability.[143]

First Amendment protections apply to expressive conduct even if it is morally reprehensible to public sentiment.[144] However, when it comes to minors, states typically have more constitutional power to regulate expressive conduct than in situations involving adults. Some might justify government intervention to stop teen sexting or, at the very least, to educate on the harms of sexting, by invoking the doctrine of *parens patraie*.[145] It is a legitimate state interest to protect children from the unintended negative consequences of sexting,

142. *See generally* Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. PA. 2009).

143. A.H. v. State, 949 So. 2d 234, 240–41 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting).

144. Texas v. Johnson, 491 U.S. 397 (1989).

145. *See* Schall v. Martin, 467 U.S. 253, 265 (1984) (holding that "that juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's parens patriae interest in preserving and 'promoting the welfare of the child'" (quoting Santosky v. Kramer, 102 S. Ct. 1388, 1401 (1982))).

which minors neither recognize nor appreciate due to their immaturity and vulnerability.[146]

However, government must tread lightly to avoid stepping on parents' toes. Although diversionary programs for teen sextors are far superior to criminal prosecution, there are constitutional pitfalls to mandate such programs. Any condemnation of sexting between consenting minors necessarily involves moral judgments about sexual identity and self-expression, areas that belong to the private sphere of parenting, free from government interference.

Presumably, an educational campaign on the harms of sexting, targeting children in general, would not have the same constitutional infirmity as mandatory programs. However, if the "Just Say No to Drugs" campaign is any indication of how effective a "Just Say No to Sexting" campaign would be, government funds might be better spent elsewhere.[147]

## V. Sexting and Common Law Tort Liability

*Some* sexting is constitutionally protected;[148] but, not all sexting is equal. Where sexting falls along the continuum of First Amendment protections depends on its content and intended use. This ultimately affects the government's power to constitutionally regulate sexting. Where criminal law fails as an effective deterrent to stop the harm caused by sexting, tort law provides a better solution. The wrong committed by most teen sextors is public dissemination of private pictures, which causes dignitary harm and emotional distress.

As we live more of our day-to-day lives in a virtual world, the laws meant to apply in the physical world need to be re-examined. This is especially true in the area of common law torts. Excluding dignitary torts, it is almost impossible to successfully bring a claim of negligence for damages allegedly caused by a publication, and the same would be true for sexting—a new and specific type of

146. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (establishing that the states, as the *parens patriae*, have the power to guard the general interest in youth's well-being.). The Court stated that the "state's authority over children's activities is broader than over like actions of adults," thereby recognizing the special status of children and the ability to protect them even when this entails stepping on parental rights. *Id.* at 168.

147. *See* Clarence Lusance, *In Perpetual Motion: The Continuing Significance of Race and America's Drug Crisis*, 1994 U. CHI. LEGAL F. 83, 95 (1994) ("It should be stated at the outset that the Reagan and Bush drug wars of symbols, slogans, and stiff sentences failed miserably").

148. This is the author's opinion based on the few court cases.

publication.[149] Notwithstanding First Amendment concerns, negligence claims fail primarily for two reasons.

First, it is difficult to establish that a publisher owed a duty to the specific plaintiff. When publications are intended for public consumption, such as books, films, and internet postings, it is nearly impossible to establish that someone harmed by the publication was a foreseeable plaintiff. The Cardozo/Andrews[150] battle has long been settled; the duty owed in a negligence claim is not "to the world at large,"[151] but rather, to those within the "range of apprehension."[152] Indeed, if Andrews' locution were to be adopted, those who publish on the Internet would risk liability to an infinite number of plaintiffs. This, however, is not true when sexts are forwarded to unauthorized viewers. Those appearing in the depictions are the foreseeable plaintiffs.

The second fatal flaw of these publisher liability claims is causation. In most cases, it is too difficult to show that the harm was a foreseeable risk of the publication. While all acts could foreseeably cause harm, tort liability requires more. For conduct to be actionable, the harm must be "not only foreseeable but also too likely to occur to justify risking it without added precautions."[153] Further, given the remoteness of time and space between the publication and the harm, it is difficult to establish an unbroken chain of causation. Publishers often point to other intervening causes that supersede any risks created by the publication.

It is foreseeable that forwarding a private sext to unintended viewers will cause embarrassment, humiliation, and ridicule. In fact, sexting is often done for the very purpose of causing this type of harm. However, sexting is different from other publisher liability claims. In teen sexting cases, the person harmed most often contributed to the chain of events leading to his or her harm. The pictures that cause harm usually originate with the full consent and participation of the prospective plaintiffs.

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149. Terri R. Day, *Publications That Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?*, 36 SANTA CLARA L. REV. 73 (1995); Terri Day, *Bumfights and Copycat Crimes . . . Connecting the Dots: Negligent Publication or Protected Speech,* 37 STETSON L. REV. 825 (2008).

150. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928).

151. *Id.* at 350.

152. *Id.* at 344.

153. DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 165 (5th Ed., Thompson/West Publishers 2005).

As the court said in *A.H. v. Florida*, a reasonably prudent person would expect private sexts to be shared with unintended viewers in the future.[154] In fact, the surveys on teens' sexting habits report that "1 in 5 sext recipients . . . passed the images along to someone else."[155] Even a subjective expectation of privacy would not matter in the torts context.

There are other issues that make negligence unworkable as a remedy for harms caused by sexting. A legal remedy must be both legally sustainable and practical. To sue minors for damages would be a hollow remedy. As is common knowledge in the legal profession, a defendant must have pockets deep enough to pay a judgment. Under the common law, parents would not provide those "pockets" from which to collect a judgment.[156]

Sexting is a particularly "bad" fit for common law negligence. Teens' lives exist in a virtual world, and "the slippery slope" of extending common law negligence to digital communication is just too steep. However, a statutory cause of action, making parents vicariously liable for their kids' sexting misuse, applying an actual malice standard, would strike a balance between the harshness of criminal law sanctions and the infirmities of common law tort remedies.

## VI. Conclusion—Vicarious Liability for Parents Applying an Actual Malice Standard

To many, teen sexting is unconscionable, even criminal. Such use of technology is unthinkable to most adults, not for lack of interest in sexually explicit pictures; but because, unlike teens, adults can appreciate and understand the risks of private pictures floating in cyberspace. However, no matter how misguided teens are in thinking that sexting is "no big deal" and just a means for "fun and flirtation," efforts to protect teens from themselves must be measured. Criminal prosecutions under child pornography laws and mandatory sex offender registration are draconian responses to teen sexting, disproportional to the crime, and contrary to Supreme Court dictates that juveniles, because of their immaturity and inability to appreciate the consequences of their actions, should be spared the harshest

154. A.H. v. State, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007).

155. MTV Report, *supra* note 3.

156. Under common law torts, parents are not liable for their children's torts nor subject to liability for failure to supervise their children's normal kid-like activities.

penalties. Removing mandatory sex offender registration, downgrading sexting from a felony to a misdemeanor, or mandating diversionary programs are steps in the right direction. However, even these lesser criminal sanctions to punish and to deter teen sextors may be constitutionally flawed.

Considering the polar opposite views on sexting, from "kids will be kids" to "teen sextors as child pornographers," the statutory civil cause of action proposed is a measured response to both views. Similar to the actual malice standard for public official defamation,[157] forwarding sexts, knowingly or with reckless disregard for the harm caused to those appearing in the pictures, would be actionable.[158] Further, the proposed statutory cause of action would put a cap on damages and hold parents vicariously liable. This proposed statutory cause of action, with an actual malice standard, would provide compensation for those harmed by the sexting, deter the misuse of sexting, and hold minors accountable for sexting abuse via parental control. The actual malice standard would prevent the feared "floodgates" concern of civil liability and require actual malice, a heightened level of culpability, to impose liability.

Finally, this proposed solution does not trample on the constitutional rights of parents and their children. The threat of civil damages is a strong deterrent. Parents who turn a blind eye to their children's digital use will be motivated to be proactive. It may seem to be an insurmountable task to control the combination of kids, sex, and technology. But, depending on the age of the minor, there are things that parents can do to take precaution.[159] Like the parent in *Miller v. Mitchell*, parents have the constitutional right to instill in their children values and beliefs about morality, self-respect, sexual identity, and proper gender roles, free from government interference. However, with constitutional rights comes responsibility. Holding

157. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

158. In *N.Y. v. Sullivan*, the Supreme Court articulated the actual malice standard for defamation of public officials. *Id.* at 280. Actual malice is making false statements knowing they are false or with reckless disregard for their truth or falsity. *Id.*

159. The possibilities are endless and not the focus of this paper. However, some things parents should do as a matter of course. Parents should begin talking with their children about the proper use of technology at a very young age. At least for very young children, a first computer should be put in a common area in the home. Leaving children alone in their room for hours on end with a computer for entertainment creates an expectation of privacy on the child's part that parents have no right to monitor their digital activity. There are also practical control mechanisms. Parents can refuse to pay for digital database use on their kids' phone plan. Since phone cameras are standard, kids could still use their cell phones to take nude pictures but be prevented from texting or e-mailing the pictures.

parents vicariously liable for the harms caused by their children's sexting misuse is an incentive for parents to take notice of their children's digital activity and to take responsibility for teaching the values-based lessons implicated by sexting, before sexting goes "bad."

Most teen sexting begins innocently. Whether motivated by romance or fun, the pictures convey a message to the recipient. It is legally dishonest to characterize voluntarily made and sent nude or semi nude pictures of teens as child pornography. Adults are hard-pressed to convince teens that their sexting activity is wrong when Victoria's Secret models[160] grace magazine covers and appear in prime-time television commercials. However, even innocently intended sexting can cause harm when private photos are publicly disseminated, especially when done with actual malice. The statute proposed targets the conduct of public dissemination, when done knowingly or with reckless disregard for the harm caused to the people depicted in the picture, not the content of the message. Kids are free to be kids, even to be negligent. The risk of harm resulting from innocently-intended or negligent sexting is the "price" children pay for the "freedom" to share private expressions of sexual desire in the digital world.

160. VICTORIA'S SECRET, http://victoriassecret.com (last visited Sept. 27, 2010).

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